123

(1)

No.

IN THE

Supreme Court of the United States

Kirk Dana Robinson,

Petitioner,

v.

Shann Elyse Chastain,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the appellate court violate due process by denying a request for written supplemental briefing or rehearing in response to sua sponte issues and law not briefed by either party to a case concerning real property and relied upon in the courts decision?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are petitioner Kirk Dana Robinson and respondent Shann Elyse Chastain.

Mr. Robinson is a private individual who originally filed a quite title action in Orange County Superior Court (*05CC12936*), Robinson v. Chastain, on 8 December 2005.

Ms. Chastain is a private individual and aunt of Mr. Robinson who filed a cross-complaint in the above action on 30 August 2006.

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OPINION BELOW

On 10 December 2008 the Supreme Court of California denied, without comment, a petition to review the decision of the Appellate Court (*4th District, Division 3*) and its subsequent refusal to grant a rehearing in this case, assigning it a case number of **S168010**. This denial appears in Appendix (hereinafter App.) F to this petition.

The Appellate Court's denial, without comment, of the petition for rehearing of this case (assigned the case number of **G038954** by the Appellate Court) occurred 27 October 2008. This denial appears in App. C to this petition. This followed that court's issuance of its decision on 25 September 2008. The Appellate Court's decision appears in App. B to this petition.

The Superior Court of California, County of Orange, issued its judgment and statement of decision on 18 May 2007. A copy of the statement of decision appears in App. A to this petition.

JURISDICTION

The California Supreme Court issued its final judgment on 10 December 2008. App. D. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 68081 of the California Government Code provides:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

STATEMENT OF THE CASE

Petitioner Kirk Robinson (Robinson) owned real property in the City of Orange in joint tenancy with his grandmother Lorraine Chastain (Lorraine). In 1998, Respondent Shann Chastain (Chastain)

acquired a general power of attorney from Lorraine who was her mother. Respondent Chastain then utilized the general power of attorney to deed to herself the rights Lorraine previously held in joint tenancy with Petitioner Robinson. Chastain moved onto the property with Lorraine in 1999 and lived with her until Lorrain's death in 2000. Chastain continued to live on the property without interruption. Robinson was aware of her occupation and took no action until learning of the quit claim in 2004. Robinson filed a quiet title action in December 2005. This was followed by a cross-complaint filed in August 2006 by Chastain in which, amongst other claims, Chastain claimed title by adverse possession. The trial court found for Chastain on the question of adverse possession utilizing a more likely than not standard and ignoring the violation of California Probate Code § 4264 which prohibits a fiduciary from conveying property to himself/herself or from altering a survivorship without express written authority from the principal.

This decision was appealed.

On 25 September 2008, the Appellate Court of California, 4th District, Division Three, issued its decision in this case. App. B. In its decision, the court made factual errors in its statements of the case's history that were subsequently used in making its legal decision. The court also made errors in its application of legal principals well understood and established in California law of

such magnitude that no reasonable briefing of the case by either party would have anticipated them.

A petition for rehearing was therefore made on 10 October 2008 in which specific errors in the decision and sua sponte issues which neither side had briefed were cited. The petition specifically cited Government Code § 68081 as its basis for a right to a mandatory rehearing. This petition was denied without comment on 27 October 2008.

The California Supreme Court was then petitioned to cause the Appellate Court to give opportunity for proper briefing on the non-briefed issues or, failing that, to grant direct relief and reverse the decisions of the lower courts. The California Supreme Court, on 10 December 2008, denied rehearing without comment leading to the filing of this writ of certiorari with the Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION

The California courts have incorrectly decided federal and state due process requirements. Their failure to address due process procedure required by statute and court rules is in conflict with decisions of this court and the United States Courts of Appeals.

THE CALIFORNIA COURTS HAVE INCORRECTLY DECIDED A FEDERAL QUESTION OF PROCEDURAL DUE PROCESS BY DENYING A PETITION FOR SUPPLEMENTAL BRIEFING OR REHEARING ON ISSUES RAISED *SUA SPONTE* BY THE COURT OF APPEAL RELIED UPON TO DECIDE THE CASE

A. Due Process Requires That Decisions Made on Issues Accommodate, at a Minimum, Briefing And Argument on Those Issues

> [W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the Enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

The preceding quote from *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) makes clear California appellate courts must afford due process protection to parties before it. Failure to grant supplemental briefing or rehearing on issues used is a failure to grant due process guaranteed both by court procedure but more importantly by California statute. California Government Code § 68081 states:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

The California Legislature enacted Government Code section 68081 in 1986 to ensure due process and to prevent the courts from making new law upon grounds which none of the parties to the appeal has had the opportunity to research or address. The bill's sponsor, the Attorney General, cited four criminal cases in which the courts had rendered decisions based on issues not briefed or proposed by any party. In one case, the court had redefined first degree felony murder. People v. Dillon, 34 Cal. 3d 441 (Cal. 1983). In another, the court had changed the law of California's Proposition 8 by limiting the use of prior felony convictions for impeachment purposes to those of "moral turpitude," and without defining "moral turpitude." People v. Castro, 38 Cal. 3d 301 (Cal. 1985). These decisions resulted in new law without the benefit of the adversarial process, in contravention of the due process rights of the parties.

The California Supreme Court defined its understanding of Government Code § 68081 best in its opinion in People v. Alice, 41 Cal.4th 668:

> We do not suggest, of course, that the parties have a right under section 68081 to submit supplemental briefs or be granted a rehearing each time an appellate court relies upon authority or employs a mode of analysis that was not briefed by the parties. The parties need only have been given an opportunity to brief the issue decided by the court, and the fact that a party does not address an issue, mode of analysis, or authority that is raised or fairly included within the issues raised does not implicate the protections of section 68081.
>
> *Rule 8.516(b)(1) of the California Rules of Court* provides that, without permitting the parties to submit supplemental briefs, "[t]he Supreme Court may decide any issues that are raised or fairly included in the petition [for review] or answer." But rule 8.516(b)(2) adds the limitation that this court "may decide an issue that is neither raised nor fairly included in the petition or answer" only if "the court has given the parties reasonable notice and opportunity to brief and argue it.

The position of California authorities is now clear of this issue. If an issue may reasonably be assumed to have been included in the arguments, or if the issue is of such a basic nature that its

existence is assumed in a case (*as in the question of standard of review which exists in each case*), there exists no violation of due process rights if the court raises such issues in its decision. If, however, the nature of the issue upon which the decision is to some degree based is one that could not have reasonably been anticipated by the parties and was therefore not briefed, there exists a clear violation of due process if the parties are not allowed the opportunity for written brief or a rehearing upon timely notice.

Due process rights guaranteed by the Constitution are not to be less protected when violated by state courts. In *Gideon v. Wainwright,* 372 U.S. 355, Mr. Justice Douglas stated:

> While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights.
>
> Justice Field, the first, Justice Harlan, and probably Justice Brewer, took that position in O'Neil v. Vermont, 144 U.S. 323, 362—363, 370—371, 12 S.Ct. 693, 708, 711, 36 L.Ed. 450, as did Justices Black, Douglas, Murphy and Rutledge in Adamson v. California, 332 U.S. 46, 71—72, 124, 67 S.Ct. 1672, 1683, 1686, 91 L.Ed. 1903. And Poe v. Ullman, 367 U.S. 467, 515—522, 81

S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the Slaughter-House Cases, 16 Wall. 36, 118—119, 122, 21 L.Ed. 394, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in Walker v. Sauvinet, 92 U.S. 90, 92, 23 L.Ed. 678. Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. Mr. Justice Jackson shared that view.

But that view has not prevailed and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

B. The Appellate Court erred in basing its decision upon a misstatement of material fact regarding county records and not granting a rehearing to correct the issue upon timely notice.

At the bottom of page two of its decision, the Appellate Court stated that the power of attorney appointing Chastain as Lorraine's attorney-in-fact was not notarized. This was not the case. A copy of the power of attorney (App. G) clearly shows that the power of attorney was notarized and filed with the county, a fact stipulated by both parties. By making this substantive error, the court could ignore claims that Chastain had violated her fiduciary duty and violated California Probate Code § 4264.

> A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power of attorney:
>
> (c) Make or revoke a gift of the principal's property in trust or otherwise.
>
> (e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.
>
> (f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

By executing a quitclaim deed transferring Lorrain's rights of the joint tenancy to herself without express written authorization, Chastain violated all three of these sections.

As both parties stipulated to the fact that the power of attorney was notarized and filed with the county, neither party had reason to brief or even

consider briefing the issue of the power of attorney not being notarized. The inclusion of this in the Appellate Court's decision without granting an opportunity to written brief or a rehearing is a clear violation of due process rights.

C. The Appellate Court erred in basing its decision upon a misstatement of material fact regarding the findings of the lower court and not granting a rehearing to correct the issue upon timely notice.

The Appellate Court made the assumption in its decision that an earlier grant deed in which Robinson became a joint tenant with Lorraine was obtained by fraud in the absence of findings. In its decision, the court wrote:

> "the trier of fact, however, could reasonably conclude the circumstances manifested a view that Robinson's interest was not valid because he obtained it by fraud, that Chastain was only presenting him an opportunity to do the right thing by tearing up his fraudulent deed and that, whether he agreed to do so or not she would hold the whole property adversely to him."

The lower court, however, stated the following in its statement of decision (App. F):

> "With regard to the second and third (fraud-undue influence and elder abuse) causes of action of Chastain's cross-complaint, the Court's decision is (assuming without deciding Chastain has sustained her

> burden of proof on these claims) those claims are barred by the statute of limitations as set forth in Code of Civil Procedure § 338 and § 335.1. The actual legal basis for this decision is the acts complained of occurred in 1993 and, if not discovered by Lorraine Chastain during the remaining seve . years of her life, were barred three years after her death on February 3, 2000." (pg.5)

In basing its decision upon the mistaken fact that the lower court determined that fraud had taken place, the Appellate Court assumed that Chastain's proffering of a quitclaim deed for Robinson to sign at Lorrain's funeral was not recognition of his ownership of the property, in part or in whole. California law, like that of most states, precludes claiming land by adverse possession where there has been any recognition of the owner of record's rights:

> The element of hostility means not that the parties have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner unaccompanied by any recognition, expressed or inferable from the circumstances of the right in the later. *Buic v. Buic* (1992), 5 CA 4th 1600.

As both parties understood from the statement of decision issued by the Superior Court that any claim of fraud was time barred and therefore not decided, neither party briefed the issue of the trier of fact concluding that Robinson's interest was not valid. This issue was critical to the Appellate

Court's decision that the adverse possession was valid and therefore the need to be able to brief the issue was equally critical. Failure to grant the right to written brief or rehearing of this issue upon timely notice constitutes a clear violation of due process.

D. The Appellate Court erred in basing its decision upon a misstatement of the law of such an egregious nature that it could not have been reasonably anticipated and not granting a rehearing to correct the issue upon timely notice.

In its decision, the Appellate Court made the following statement on page 8 in support for a claim of adverse possession by claim of right:

> Curiously, adverse possession under claim of right, as opposed to claim of title, may only be asserted as to "cultivated or improved" land (Code of Civ. Proc., § 325; see Witkin, supra, § 226, pp. 281-282), but the home on the property clearly satisfied that criteria.

The statute quoted, CCP § 325, and the section before it, CCP§324, refer to property claimed by adverse possession not based upon a written instrument. They read:

> 324. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

> 325. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:
>
> First--Where it has been protected by a substantial inclosure.
>
> Second--Where it has been usually cultivated or improved.
>
> Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land.

The process of creating an inclosure [sic] was an act by the person adversely possessing the land delineating the area claimed and served as a mechanism for making a claim of possession in such a way as to put the owner of record and the community on notice of the claim of right. Equally, the issue of cultivating or improving the land was to specify the area claimed and was an active requirement of the party claiming the land to show adversity and give notice to the owner of record. The person adversely possessing the land makes improvements to the property and by doing so both puts the owner and community on notice that they

are expressing a claim of right to the improved property or improved section thereof.

The interpretation of the Appellate Court to these sections of the California Code of Civil Procedure is that at any time, by any person, any improvement needs must to have been done to the land to assert a claim of right upon it. By this interpretation of the code, any non-barren property is so subject. This is clearly an interpretation of the statutes that is far removed from the legislative intent and from general usage.

As no obvious improvement or substantial enclosure was made or claimed to have been made to the property, neither party had any cause to brief this issue. The Appellate Court, however, relied upon this interpretation to establish a claim of right for the property that would hold even if any claim under color of title were removed.

> Finally, Robinson argues a Probate Code provision prohibiting self-dealing destroyed Chastain's claim of title to Lorraine's interest in the property, even if Lorraine's grant of power of attorney to Chastain had been properly notarized. (See Prob. Code, § 4264 [person holding power of attorney may not execute a quitclaim deed to himself or herself].) But Chastain asserted her adverse possession claim under both a claim of title and a claim of right and, as discussed, substantial evidence supports judgment in her favor on the latter.

Failure to grant the right to a written brief or rehearing on this critical issue clearly caused

significant harm. As the Appellate Court's interpretation is so far removed from standard usage, there could be no reasonable expectation from known facts or law that the court would raise such an issue and then rely upon it for its decision.

D. The Appellate Court erred in basing its decision upon a wholly new interpretation of evidentiary law and then failing to provide an opportunity to make a written brief or grant a rehearing upon timely notice.

On the first line under the subsection of "Factual and Legal Basis for Decision" of its statement of decision, the lower court states a burden of proof for Chastain's cross-complaint claim of adverse possession of "more likely to be true than not true." No basis for this standard of proof is given and a significant part of Robinson's appellate brief was directed at correcting this error. Chastain, in her response, made no reference to challenges to the lower court's presumed burden of proof.

California Evidence Code §662 provides that an owner of legal title of the property is presumed to be the owner of the full beneficial title and that this may only be rebutted by clear and convincing evidence. This code has been relied upon by real estate law texts for establishing the standard of review for adverse possession claims in recent history. Indeed, the California 4th Appellate District has quite recently applied the same standard to prescriptive easements in *Brewer v. Murphy* (2008) 161 CA 4th 928.

The earliest instance of a clear and convincing standard being expressly applied to adverse possession in California is in *Spotswood v. Spotswood* (1907), 4 CA 711 where it was stated:

> Indeed, keeping in view what constitute the elements of adverse possession (citations omitted) and remembering such elements must be shown by clear and positive proof (*Ward v. Cochran, 150 U.S. 597, [14 Sup. Ct. Rep. 230]*; *Irvine's Heirs* v. *McRee*, 5 Humph. (Tenn.) 554, [42 Am. Dec. 468]) it is at least doubtful whether the evidence would support a judgment for appellant.

It was, in light of this established record of the use of clear and convincing evidence to prove adverse possession, a complete surprise to have the Appellate Court create in its decision a new assertion in support of a "more likely than not" standard required for adverse possession. The Appellate Court cited *Murray v. Murray* (1994), 26 CA 4th 1062, as standing for the proposition that Evidence Code § 662 applies only when valid legal title is undisputed and the controversy surrounds only the beneficial title. The appellant decision concluded that since legal title was in dispute, Evidence Code § 662 would not apply to any adverse possession. This analysis had not been sponsored or even mentioned by the respondent. At oral argument, no judge raised this issue in any manner.

This was a completely new claim by the Appellate Court. No hint was given by the court prior to the decision, nor was any claim made by either party other than those supporting a clear

and convincing standard of proof. As this claim has never before been put forward, there could not have been any reasonable expectation that it could have been briefed prior to the decision. Due process would therefore have required an opportunity be given to provide written briefs or for the court to grant a rehearing on this issue. The court failed to do either.

CONCLUSION

The procedural due process problems raised merit the attention of this court. The Constitution of the United States guarantees protections against arbitrary seizure of property without due process of the law, as does that of California. The Appellate Court, in this instance, acted in defiance of California Statute, its own court rules, clear instructions from the California Supreme Court, and constitutional guarantees in disregarding the timely request to be granted the opportunity to give written briefs or to a rehearing when it included issues never brief by either party in its decsion. That the parties never had the opportunity to brief the issues herein cited is clear. In each case, no reasonable expectation could have anticipated the inclusion of these issues by the court in its decision, either due to their being factually erroneous or legally erroneous. Defense of property rights and due process require affirmative action on this petition. It is respectfully requested that this Court grant certiorari to consider the issue presented and to order a rehearing with supplemental briefing and argument on the subject action.

Dated: 9 March 2009

Respectively submitted,

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Filed 9/25/08 Robinson v. Chastain CA4/3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KIRK D. ROBINSON,

Plaintiff and Appellant,

v.

SHANN ELYSE CHASTAIN,

Defendant and Respondent.

G038954

(Super. Ct. No. 05CC12936)

OPINION

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Michael F. Babitzke for Plaintiff and Appellant.

Robert S. Lewin for Defendant and Respondent.

* * *

Kirk D. Robinson appeals the judgment of the trial court denying him relief in his quiet title action against his aunt, Shann Elyse Chastain. Robinson challenges the sufficiency of the evidence to support the trial court's judgment granting title in her mother's home to Chastain by adverse possession. Because substantial evidence supports the judgment, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 1993, Robinson aided his grandmother, Lorraine Chastain,[1] in obtaining a home equity loan on her residence in Orange to accomplish needed repairs. Robinson handled the loan transaction, obtaining Lorraine's signature on the necessary documents. He also obtained Lorraine's signature on a deed to the home naming him as her joint tenant. Robinson advised Lorraine and

[1] We subsequently refer to her as Lorraine to avoid confusion with respondent, her daughter.

Chastain that he deposited the loan proceeds, $23,489.35, in a separate account to be used only for house repairs and to make payments on the loan. He admitted at trial, however, that he deposited the money in his personal bank account. Robinson applied approximately $6,000 of the loan proceeds to repairs, but squandered the rest. He gave $4,450 to his fiancée; $4,500 to an "acquaintance," spent thousands of dollars on computer games, and kept over $5,000 for himself.

Robinson moved out of the house in mid-1997. Chastain did not live with her mother at the time, but began to undertake the remaining repairs, which cost more than $15,000. According to Chastain, once Lorraine understood the effect of a joint tenancy deed, she hired a lawyer to resolve the matter. The lawyer, however, only had Lorraine execute a power of attorney in favor of Chastain, which Lorraine failed to have notarized.

Chastain moved back into Lorraine's home in March 1998. Lorraine wanted Chastain to have the home, so she directed Chastain to execute a quitclaim deed to herself using the power of attorney. Chastain recorded the deed in December 1998 and filed, on Lorraine's behalf, the requisite transfer of ownership form with the tax assessor's office. Chastain checked the box on the assessor's form stating that the transferor, Lorraine, owned the property in joint tenancy. She specified in an attachment to the assessor's form the fraudulent manner in which Robinson became the other joint tenant.[2] Chastain's resolve grew to hold the home

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[2] Noting that Robinson's "whereabouts are unknown," Chastain's letter to the assessor stated: "This individual is

as her own, regardless of the fraudulent deed Robinson obtained. She paid the taxes on the home continuously for more than five years, beginning in October 1999.

Lorraine died in February 2000. At her funeral, Chastain presented Robinson with a quitclaim deed, demanding that he sign it. When Robinson refused, Chastain embraced him with what her attorney later characterized as a "Mafia hug." She whispered in his ear, "'We know what you've done,'" and asserted her right to the whole property on account of his misdeeds. Robinson testified he understood at that moment that "Shann wanted the whole property." He advised her she would hear from his lawyer, but he never pursued the matter further until the spring of 2006, when he paid the property taxes on the home before Chastain could do so and filed his quiet title action.

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the grandson of [Lorraine]. He took her to get a loan on the home for repairs to the home. This is how his name got on the deed as a joint tenant. The money obtained by the loan, he used a portion to put a roof on the property. This was all that was done to the property with the loan money. He apparently took the rest of the money with him, as [it] is no[]where to be found. [¶] He has had very minimal contact with my mother (Lorraine Chastain) and whenever he calls her he won't tell her where he is. We have been left to make the payments on the loan ourselves[,] and any further improvements to the house I personally have paid for. I would like to know how to contact Kirk myself as you can imagine, attorney fees has [*sic*] also been costly in regards to trying to handle this problem. [¶] Because of the above situation my mother's portion of the property has been transferred to me, as we both live at the above[-] mentioned property, and I am trying to be sure that her wishes are followed as to what she desires to be done."

In ruling against Robinson, the trial court expressly found: "To the extent the testimony of Robinson controverts the evidence proffered by Chastain on any element of adverse possession (e.g. hostil[ity] or advers[ity] element), the Court finds the testimony of Robinson lacks veracity and resolves all such conflicts in favor of Chastain. Robinson deliberately testified untruthfully on these issues and I therefore choose not to believe anything he said." Robinson now appeals.

II

DISCUSSION

Robinson contends Chastain failed to establish her possession of the home was adverse and hostile to his interests. "Adverse possession is a means of acquiring title to property, after lapse of time, by continued possession." (12 Witkin, Summary of Cal. Law (2005) Real Property, § 212, p. 270 (Witkin), citing Civ. Code, § 1007.) "To establish title by adverse possession, the claimant must establish the following five requirements: 1) Possession under claim of right or color of title; 2) actual, open, and notorious occupation of the premises in such a manner as to constitute reasonable notice to the true owner; 3) possession which is adverse and hostile to the true owner; 4) possession which is uninterrupted and continuous for at least five years; and 5) payment of all taxes assessed against the property during the five-year period." (*Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604 (*Buic*); see also Code Civ. Proc., §§ 322-325 [codifying adverse possession requirements].) The burden of proof rests on the

claimant. (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421 (*Dimmick*).)

As a preliminary matter, Robinson contends the trial court erred in utilizing the preponderance of evidence standard. Robinson relies on Evidence Code section 662, which provides: The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." Evidence Code section 662 applies when valid legal title is undisputed and controversy surrounds only the beneficial title. (*Murray v.* Murray (1994) 26 Cal.App.4th 1062, 1068.) Adverse possession, however, has nothing to do with potential divergences between legal title and who is entitled to the beneficial use or equitable enjoyment of property. Rather, in asserting a superior legal right to the property, the adverse possessor attempts, in essence, to void legal title held by another, and in such instances the preponderance of evidence standard applies. (*Ibid.*)

Robinson contends Chastain's claim of title to the home fails because, even assuming Lorraine validly quitclaimed her interest to Chastain, Lorraine only conveyed to Chastain her interest as a joint tenant with Robinson, which did nothing to extinguish Robinson's interest. In other words, Chastain could only claim a legal right to sever the joint tenancy and obtain half the property, not all of it. But "[t]itle to property by adverse possession may be established under *either* color of title or by claim of right." (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321, italics added.) One who oversteps rights

conveyed by title asserts, in effect, a claim of right based on possession. (Witkin, *supra*, § 225, p. 281.)

Exclusive possession, however, is insufficient to establish the requisite hostility to a cotenant's ownership interest. (*Russell v. Lescalet* (1967) 248 Cal.App.2d 310, 314 (*Russell*).) Each cotenant enjoys a right to occupy the whole property. "'The possession of one is deemed the possession of all; each may assume that another in exclusive possession is possessing for all and not adversely to the others . . . .'" (*Dimmick*, *supra*, 58 Cal.2d at p. 422.)

Here, Chastain alleged Robinson obtained joint tenancy in Lorraine's home in 1993 by fraud, but the trial court made no specific finding of fraud and apparently did not base its ruling on that ground. Even assuming, however, that Robinson validly obtained his interest and that Lorraine's quitclaim deed to Chastain gained for Chastain only a joint tenancy with Robinson, Chastain's actions were sufficient to oust him.

"'"Before title may be acquired by adverse possession as between cotenants, the occupying tenant must bring home or impart notice to the tenant out of possession, by acts of ownership of the most open, notorious and unequivocal character, *that he intends to oust the latter of his interest in the common property.* [Citations.] Such evidence must be stronger than that which would be required to establish a title by adverse possession in a stranger. [Citations.] . . . [Citation.]'" (*Russell, supra,* 248 Cal.App.2d at p. 314, italics added.) "The occupying cotenant must give notice to the other cotenants of the adversity of his or her

possession and of the exclusive claim to the title in such a manner that the cotenant out of possession knows or should know that action is required to protect his or her interest in the property. [Fn. omitted.] Also, the cotenant in possession must exclude the others from possession. [Fn. omitted.] [¶] . . . [¶] Whether there has been a sufficient ouster and notice to the other cotenant out of possession is a question of fact. [Fn. omitted.]" (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 16:32, p. 69-71 (Miller & Starr).)

Substantial evidence supports the trial court's conclusion that Chastain ""br[ought] home"" to Robinson (*Russell, supra*, 248 Cal.App.2d at p. 314) that she claimed the whole property and nothing less. In dramatic fashion, she embraced Robinson at Lorraine's funeral in February 2000, whispered in his ear, "'We know what you've done,'" and asserted her right to the whole property on account of his misdeeds. Robinson testified he understood at that moment that "Shann wanted the whole property." "[W]hen there is an intent to hold the property as against the other cotenants *and the other cotenants have actual knowledge of such intent*, . . . [s]uch facts would constitute an ouster of the cotenants not in possession and, if continued for the prescriptive period, would enable the tenant in possession to establish a prescriptive title. [Fn. omitted.]" (Miller & Starr, *supra*, § 16:33, pp. 71-72.) Chastain thereafter excluded Robinson from the property, as required to possess adversely against a cotenant. (*Id.*, § 16:32.)

Robinson testified he reached an agreement with Chastain after the funeral for her exclusive

possession of the home if she continued to pay the mortgage and taxes. (See Witkin, *supra*, § 216, p. 274 ["If the owner permits the person to use the land, the possession is not adverse"].) But Chastain denied any such agreement and the trial court, as the trier of fact, has exclusive province to decide the credibility of witnesses. (*Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 139.)

Robinson contends he had no notice Chastain changed the locks on the home, made improvements or repairs with or without his permission, or that she had a tenant and kept the rent exclusively for herself rather than paying him his share as a co-owner. Such actions demonstrate the adversity of one cotenant against another, but none is required where Chastain's announcement at the funeral demonstrated the hostility of her claim. Moreover, while Robinson never tried the locks, Chastain made sure to instruct her neighbor and her tenant to bar Robinson from entry, as they did in November 2004 while she was away, further illustrating the adversity of her claim. Curiously, adverse possession under a claim of right, as opposed to a claim of title, may only be asserted as to "cultivated or improved" land (Code Civ. Proc., § 325; see Witkin, *supra*, § 226, pp. 281-282), but the home on the property clearly satisfied that criteria.

Robinson's reliance on *Preciado v. Wilde* (2006) 139 Cal.App.4th 321 (*Preciado*) is misplaced. There, the out-of-possession cotenant "had no notice [her uncle] wanted to interfere with her right to possession and title." (*Id.* at p. 325.) The uncle

admitted he "never excluded" his niece from the property, "never restricted her access, or informed her he was challenging her ownership. He constructed fences, but admitted they were not designed to exclude family members, such as [his niece]." (*Ibid.*)

Preciado also noted, in upholding the trial court's denial of adverse possession, that the uncle did not challenge his niece's interest but rather implicitly recognized its validity when he offered to buy it. (*Preciado*, *supra*, 139 Cal.App.4th at p. 326.) Robinson argues Chastain's request for a quitclaim deed at Lorraine's funeral constitutes similar recognition of his interest. The trier of fact, however, could reasonably conclude the circumstances manifested a view that Robinson's interest was not valid because he obtained it by fraud, that Chastain was only presenting him an opportunity to do the right thing by tearing up his fraudulent deed and that, whether he agreed to do so or not, she would hold the whole property adversely to him. His testimony indicated he understood Chastain's hostile intent fully.

In particular, his threat that she would be hearing from his lawyer showed Chastain had conveyed her adverse intent in "such a manner that the cotenant out of possession knows or should know that action is required to protect his or her interest in the property. [Fn. omitted.]" (Miller & Starr, *supra*, § 16:32, p. 69.) Robinson answers that his remark about his lawyer says nothing about the hostility of Chastain's claim because countless innocuous reasons exist to consult a lawyer after a funeral impresses one with the

importance of end-of-life issues and planning. Concluding Robinson was a liar, the trial court was not impressed with the spin he placed on his words and actions. It is axiomatic that we must view the evidence in the light most favorable to the judgment. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) Robinson's substantial evidence challenge is therefore without merit.

Finally, Robinson argues a Probate Code provision prohibiting self-dealing destroyed Chastain's claim of title to Lorraine's interest in the property, even if Lorraine's grant of power of attorney to Chastain had been properly notarized. (See Prob. Code, § 4264 [person holding power of attorney may not execute a quitclaim deed to himself or herself].) But Chastain asserted her adverse possession claim under both a claim of title and claim of right and, as discussed, substantial evidence supports judgment in her favor on the latter.

III

DISPOSITION

The judgment is affirmed. Respondent is entitled to her costs on appeal.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE CENTRAL JUSTICE CENTER
MAY 18 2007
ALAN SLATER. Clerk of the Court
BY P. PENDERGRAFT

SUPERIOR COURT OF THE STATE OF CALIFORNIAFOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

KIRK D. ROBINSON

Plaintiff,

v.

SHANN ELYSE CHASTAIN,

Defendant

AND RELATED CROSS-COMPLAINT

Case No: 05CC 12936

Hon. David A. Thompson

STATEMENT OF DECISION

RELEVANT PROCEDURAL HISTORY

The above-entitled cause came on for trial on April 9, 2007, pursuant to notice, in Department C28 of the above-entitled court, the Honorable David A. Thompson. Judge, presiding without a jury, a jury having been expressly waived, and was tried on April 10, April 11, April 12, April 16, and April 17, 2007. Valerie L. Kramer. Esq. appeared as

counsel for plaintiff, and cross-defendant Kirk D. Robinson ("Robinson" herein); Robert S. Lewin, Esq. appeared as counsel for defendant and cross-complainant Shann Elyse Chastain ("Chastain" herein). Oral and documentary evidence was introduced on behalf of the respective parties.

At the conclusion of Robinson's case in chief on 4-12-07, Chastain moved for judgment pursuant to CCP § 631.8 on the 1s, 2nd, 3rd, 5th and 7th (quiet title, cancellation, disparagement of title, fraud and elder abuse) causes of action in Robinson's 2nd amended complaint and, after hearing argument, the Court granted that motion for judgment. On 4-16-07 Robinson requested reconsideration of the Court's ruling the motion for judgment, and the Court took that request for reconsideration under submission without further argument.

Thereafter, further evidence was introduced, the cause was argued and submitted on 4/7/07. At the conclusion of the trial, the Court announced a tentative decision in favor of Chastain on the 1st (adverse possession) cause of action in the Chastain cross-complaint and took the matter under submission. On 4-20-07, the Court announced a final decision by written minute order which reads in relevant part as follows:

1. Defendant/cross-complainant Chastain has sustained her burden of proof on the 1st (adverse possession) cause of action in the cross-complaint, and plaintiff/cross-defendant Kirk Robinson has not sustained his burden of proof on any defense thereto.
2. To the extent the testimony of Robinson controverts the evidence proffered by Chastain

3. To the extent Chastain has sustained her burden of proof on the 2nd and 3rd (set aside deed and elder abuse) causes of action in the cross-complaint, Robinson has also sustained his burden of proof on the statute of limitations defenses thereto.
4. The 1st, 2nd, 3rd, 4th, 5th and 6th (quiet title, cancellation, disparagement of title, declaratory relief, fraud and partition) causes of action in Robinson's 2nd amended complaint are all moot in light of the adverse possession ruling.
5. Robinson has not sustained his burden of proof on the 7th (elder abuse) cause of action in the 2nd amended complaint and, in any event, as Robinson's counsel acknowledged on the record at trial, that cause of action is "fatally defective."
6. Robinson's 4-16-07 request for reconsideration of the 4-12-07 order granting Chastain's motion for judgment under CCP § 631.8 on the 1st, 2nd, 3rd, 5th and 7th causes of action in the 2nd amended complaint is moot in light of the adverse possession ruling.
7. Even if I had granted Robinson's request/or reconsideration and considered all of the evidence produced at trial, I would still have found Robinson had not met his burden of proof on the 1st, 2nd, 3rd, 5th and 7th causes of action in the 2nd amended complaint.

On 4-23-07 Robinson filed a written request for statement of decision. In response thereto, on 4-30-07 the Court issued a minute order which reads in relevant part as follows:

> *The Court has received and reviewed Plaintiff's request for statement of decision dated, served and filed 4-23-07. Any proposals as to the contents of the statement of decision must be made within 10 days after the date of request for a statement of decision. CCP § 632; CRC Rule 3.1590(d). Within the time prescribed by CRC Rule 3.1590(e), Defendant shall prepare, serve and file a proposed statement of decision and judgment, reflecting (a) the Court's 4-17-07 tentative decision announced in open court at the conclusion of the trial and the Court's 4-20-07 minute order relating thereto, (b) Plaintiff's request for statement of decision, but only to the extent the issues identified therein are controverted and form the basis for the Court's tentative decision on the adverse possession cause of action, and (c) Defendant's proposals for addition to the contents of the statement of decision, if any.*

On 5-1-07 Chastain filed a proposed statement of decision and judgment. On 5-3-07 Robinson filed proposals as to the content of the statement of decision and on 5-16-07 Robinson filed objections to the proposed statement of decision and judgment, all of which objections and proposals have been considered prior to issuing this statement of decision and the judgment of even date herewith.

FACTUAL AND LEGAL BASIS FOR DECISION

With regard to the 1st cause of action of Chastain's cross-complaint, the Court's decision is (a) Chastain has sustained her burden of proof (more likely to be true than not true) as to each and every element of adverse possession, and (b) Robinson has not sustained his burden of proof as to any alleged affirmative defense thereto. This decision is based on the following factual findings:

1. Chastain occupied and possessed the residential real property located at 274 N. Magnolia Street, city of Orange, county of Orange, California, (herein "the Property") for a continuous period of five years prior to and ending on 12-8-05.
2. Chastain's occupancy of the Property was under color of title and claim of right as hereinafter described.
3. Chastain's occupancy and possession of the Property were actual, open, notorious, exclusive, hostile and adverse as to Robinson as hereinafter described.
4. Chastain paid all taxes levied and assessed against the Property for a period of at least five years prior to the filing of Robinson's complaint on 12-8-05.
5. Chastain's possession of the Property was of land that was usually improved, and was used for the ordinary use of the occupant.
6. To the extent the testimony of Robinson controverts the evidence proffered by Chastain on any element of adverse possession (e.g. hostile or adverse element), the Court finds the testimony of Robinson lacks veracity and resolves all such conflicts in favor of Chastain. Robinson deliberately testified untruthfully on

7. On December 8, 1998, Chastain recorded a quit claim deed to the Property in her favor, at the request and with the full knowledge and consent of Lorraine Chastain, and thereafter claimed the Property exclusively as hers.
8. No later than March 30, 1999, Chastain moved her permanent residence to the Property, changed the tax records with the county assessor to reflect her ownership, changed the locks on the Property, commenced repairs in excess of $15,000, and paid the GMAC mortgage. She thereafter began paying all taxes levied and assessed against the Property, and paid same exclusively and continuously from October 1999, until Robinson's complaint was filed. After Lorraine Chastain's death, Chastain refused Robinson's effort to enter the Property, and rented a portion of the Property to a tenant and kept all rents.
9. No later than February, 2000, it was clear to both Robinson and Chastain that they were adversaries with regard to the Property. On the day Lorraine Chastain's funeral Robinson refused to sign a proffered quit claim deed transferring all of his claimed interest to Chastain and threatened that his lawyers "would be in touch."

The legal basis for the Court's adverse possession decision is Civil Code § 1007 [Chastain acquired title by occupancy of the Property for the period prescribed by statute] and Code of Civil Procedure §§ 321, 322 and 323. "When the claimant

is in possession under a color of title, his occupancy is deemed to be adverse and hostile to the rights of any other person, and it is not necessary to offer any further proof that his claim is hostile or adverse." (5 Miller & Starr. California Real Estate 2d, Adverse Possession § 16:12; CCP §322; *Wilson v Atkinson* (1888) 77 Cal. 485, 487; Estate of Williams (1977) 73 Cal.App.3d 141. 147.)

Moreover, to the extent that Robinson's knowledge of Chastain's hostile and adverse claim may be relevant,[1] Robinson had both actual and constructive notice of Chastain's hostile and adverse claim no later than February, 2000, pursuant to findings 3, 8, and 9 above, together with the presumption set forth in Code of Civil Procedure § 322.

With regard to the 2nd and 3rd (fraud/undue influence and elder abuse) causes of action of Chastain's cross-complaint, the Court's decision is (assuming without deciding Chastain has sustained her burden of proof on these claims) these claims are barred by the statute of limitations set forth in Code of Civil Procedure §§ 338 and 335.1. The factual and legal basis for this decision is the acts complained of occurred in 1993 and, if not discovered by Lorraine Chastain during the remaining seven years of her life, were barred three years after her death on February 3, 2000.

With regard to the 1st, 2nd, 3rd, 4th, 5th and 6th (quiet title, cancellation, disparagement of title,

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[1] See generally, 12 Witkin, *Summary of California Law* (10th Ed. 2005), Real Property, Cotenants, § 219, et. seq., p. 277.

declaratory relief, fraud and partition) causes of action in Robinson's 2nd amended complaint, the Court's decision is that all of these claims are moot in light of the adverse possession ruling, and the court declines to make any further findings thereon.

With regard to the 7th (elder abuse) cause of action of Robinson's 2nd amended complaint, the Court's decision is that Robinson did not sustain his burden of proof and in any event, as Robinson's counsel acknowledged on the record at trial that this claim is "fatally defective" because Robinson lacks standing to pursue it.

Any issues specified in Robinson's request for statement of decision but not discussed above are immaterial to my decision and therefore I express no opinion on them. *Vukovich v. Radulovich* (1991) 235 Cal. App. 3d 281, 294-296.

Dated: May 18, 2007

David A. Thompson

Judge of the Superior Court

Received
9/29/08

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

KIRK D. ROBINSON G038954
Plaintiff and Appellant,
v. Sup. Ct. No. 05CC12936

SHANN ELYSE CHASTAIN
Defendant and Respondent.

ORDER

Petition for rehearing is DENIED

ARONSON, J
ARONSON, J

WE CONCUR,

SILLS, PJ
SILLS, PJ

RYLAARSDAM, J
RYLAARSDAM, J

Court of Appeal, Fourth Appellate District, Div. 3 -
No. G038954
S168010

IN THE SUPREME COURT OF CALIFORNIA

En Banc

KIRK D. ROBINSON, Plaintiff and Appellant,
v.

SHANN ELYSE CHASTAIN, Defendant and Respondent.

The petition for review is denied.

SUPREME COURT
FILED
DEC 10 2008
Fredrick K. Ohlrich Clerk

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE

Kirk D. Robinson Appellant, v.	**Case No. G038954** Superior Court Case No. 05CC12936
Shann Elyse Chastain Respondent	Superior Court Judge David A. Thompson

PETITION FOR REHEARING

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I. INTRODUCTION

Petitions for rehearing may be granted where there is a substantial error of the law, a serious doubt as to the correctness of a statement of law and petition for rehearing is mandatory under Government Code §68081 when the reviewing court's decision is based on a new issue or matter and the court fails to afford the parties the opportunity to brief that new issue.

In this matter, the hearing should be granted because the reviewing court failed to apply the correct standard of proof, injected material and assumptions that were not the findings of the trial court and failed to apply proper legal standard to the evidence that was before the court.

II. ADVERSE POSSESSION MUST BE SHOWN BY CLEAR AND CONVINCING EVIDENCE

Appellant Robinson, at trial and in his appellants opening brief argued that Evidence Code §662 which provides that an owner of legal title of the property is presumed to be owner of the full beneficial title, resulted in a presumption may be rebutted only by clear and convincing evidence. The Appellate decision cited to Murray vs. Murray (1994) 26 CA 4th 1062, 1068 as standing for proposition that Evidence Code §662 applies only when valid legal title is undisputed and the controversy surrounds only the beneficial title. The appellant decision concluded that since legal title was in dispute Evidence Code §662 would not apply. This analysis had not been sponsored or even mentioned by the respondent. At oral

argument no judge raised this issue in any manner.[1] Thus, appellant had no opportunity to address this issue and matter was submitted in the belief that appellant's arguments pertaining to clear and convincing evidence were unchallenged. In California it has long been the law that adversity as to the ownership of the property must be established by clear and convincing evidence. In Spottswood v Spottswood 4 CA 711 (1907) the Appellate Court stated at 4 CA 714:

> "Indeed, keeping in view what constitute the elements of adverse possession (citations omitted) and remembering such elements must be shown by clear and positive proof (citations omitted) it is at least doubtful whether the evidence would support a judgment for appellant."

In Landini v S.M. Day 264 CA 2nd 278 (1968) @ 264 CA 2nd 281 the Court states:

> "In order to establish title by adverse possession, the claimant must show exclusive possession by actual occupation under such circumstances as to give reasonable notice to the owner of the title; possession hostile to the owner's title; a claim of ownership of the property continuous and uninterrupted possession for five years; and payment by him of all taxes levied and assessed on the property. *(Laubish V Roberdo, 43 Cal 2nd 702 [277 P.2d 9]; Code civ. Proc., §323.)" (Mooney v*

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[1] At oral argument, respondents attorney failed to appear and no questions were posed to appellant's attorney.

*Shields, 196Cal App. 2d 165, 169 [16 [*282] Cal.Rptr. 449];see Weller v Chavarria, 233 Cal. App 2d 234, 241-242 [43 Cal. Rptr. [***6] 364].* "The burden is on the claimant to prove every essential element by clear and satisfactory evidence." *Weller v Chavarria, supra, at p. 242).* If one element is wanting, the claim must fall. *(Clark v Stotts, 127 Cal. App. 2d 589, 592 [274 P. 2d 172]; Kraus v Griswold, 232 Cal. App. 2d 698, 709 [43 Cal. Rptr.139].)".*

In Applegate v Ota 146 CA 3rd 702 @ 708 the Court reiterated that a finding for a prescriptive easement must be based upon clear and convincing evidence. In Brewer v. Murphy 161 CA 4th 928 (2008) the findings "must be based on clear and convincing evidence". See 161 CA 4th 938.

Robinson's trial brief at AA260 urged the Court to use the clear and convincing evidence standard. The trial court unequivocally stated it was proceeding on the more likely than not standard. See AA380 line 7. Robinson raised this issue in his opening trial brief and Chastain did not assert anywhere in her respondents brief clear and convincing evidence standards should not be used. Nonetheless, the appeal of the Appellate Court relying upon Murray v Murray, supra, decided that the trial court did not err in applying the clear and convincing standard. The legal argument that clear and convincing evidence standard was not the correct standard does not appear anywhere in the record and thus is new matter. Robinson seeks the

opportunity to address this critical issue in a rehearing because of the absolutely critical importance of using the proper standard of proof in reviewing the trial court's decision.

III. THE APPELLANT DECISION ASSUMED ROBINSON'S ORIGINAL DEED WAS OBTAINED BY FRAUD IN ABSENCE OF FINDINGS

The opinion and order of this Court which is attached hereto and marked as **Exhibit A** and incorporated in full by this reference necessarily depends upon a finding of fraud. For example: (a) the decision states at page 3:

> "she specified in an attachment to the assessor's form the fraudulent manner in which Robinson became the other joint tenant. Chastain's resolve grew to hold the home as her own, regardless of the fraudulent deed Robinson obtained";

(b) the decision states at page 6:

> "Chastain alleged Robinson obtained the joint tenancy to Lorraine's home in 1993 by fraud, but the trial court made no specific finding of fraud and apparently did not base it's ruling on that ground"

(c) the decision states at page 8:

> "the trier of fact, however, could reasonably conclude the circumstances manifested a view that Robinson's interest was not valid because he obtained it by fraud, that Chastain was only presenting

him an opportunity to do the right thing by tearing up his fraudulent deed and that, whether he agreed to do so or not she would hold the whole property adversely to him".

Accordingly, in attempting to rationalize the trial court decision, the appellate court accepted and proceeded with the assumption that Robinson had committed fraud. However, the trial court decision, appellants appendix, at page 382, lines 1-5 reads as follows:

> "With regard to the second and third (fraud-undue influence and elder abuse) causes of action of Chastain's cross-complaint, the Court's decision is (assuming without deciding Chastain has sustained her burden of proof on these claims) those claims are barred by the statute of limitations as set forth in Code of Civil Procedure §338 and §335.1. The actual legal basis for this decision is the acts complained of occurred in 1993 and, if not discovered by Lorraine Chastain during the remaining seven years of her life, were barred three years after her death on February 3, 2000".

It is clear that the trial courts decision itself, expressly states that the trial court made no decision whatsoever on the issue of fraud. Therefore, the references in the appellate decision accepting fraud by Robinson were based upon an issue which was not briefed by any party i.e. that the 1993 deed from Lorraine to Robinson was obtained by fraud and was not the result of any

finding by the trial court and was not before the Appellant Court.

Government Code §68081 states that before a Court of Appeal may base decision upon an issue which was not proposed or briefed by any party to the proceeding the Court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the Court fails to afford that opportunity a hearing shall be ordered upon timely petition of either party.

Since, the trial court did not make any finding on fraud that means that no finding of fraud was before the Court and although Chastain was highly critical of Robinson and Chastain states in her statement of facts that Robinson spent money obtained from a loan which was acquired when the property went into joint tenancy for purposes other than what the loan was taken out for Chastain did not claim in her brief that fraud had been committed or that the trial court's decision was based upon any findings of fraud. Robinson requests a rehearing to deal with issue. Pursuant to Government Code §68068 rehearing should be granted.

IV. THE APPELLANT DECISION DID NOT PROPERLY APPLY ONE OF THE ELEMENTS OF ADVERSE POSSESSION.

Chastain never quite made up her mind as to whether or not her claim was based upon color of title or claim of right. The Appellate Court did not

address the claim of title assertions by Chastain.[2] To establish adverse possession under claim of right in addition to possession itself such possession must be actual, open and notorious occupation of the premises in such a manner as to constitute reasonable notice as to the true owner and must be adverse and hostile to the true owner. See Buic v Buic 5 CA 4th 1600 @ 1604 (1992). See also CCP §322-325. The Appellate Court relied upon the fact that the land was improved meeting the criteria of CCP §325. Virtually, all single family homes in a city are improved. But more than that is required under claim of right. The manner of occupation must be so actual open and notorious as to constitute reasonable notice to the true owner. The notice transmittal by the occupation must be shown by clear and convincing evidence. This is

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[2] Throughout the proceedings Chastain asserted a claim primarily as a color of title claim. The decision makes reference to the perception that the power of attorney was not notarized that permitted Chastain to sign the deed to herself. (See Pages 2 and 9). Neither the trial court nor either party asserted that the power of attorney was not notarized. The problem of plaintiff by appellant was that under Probate Code §4624 Chastain was prohibited as a holder of the power of attorney from using the power of attorney to grant property to herself. The law is quite clear that she could not have legally done so. While no doubt, once the deed became void by an order of the Court then Chastain's claim would be a naked claim of right. However, until such a judicial finding was declared the color of title standards should have been utilized both at the trial court and appellate court levels. This becomes significant because not only was the higher standard of proof required it was also the heightened level of notice required for a co-tenant as Robinson was according to the public record.

particularly true in a co-tenancy situation such as the one we have because each co-tenant enjoys the right to occupy the whole property. See Dimmick v Dimmick (1962) 58 C 2nd 417 @ 421.

Page 5 of the Appellate decision recites the substantial evidence to support the trial courts conclusion that the occupation was sufficiently notorious. This evidence consisted of changing the locks on the home, repairing a broken window, or renting out a room. The problem is that in terms of the physical acts none of those acts would constitute open and notorious occupation that would meet the clear and convincing evidence standard to put a reasonable person on notice that an adverse claim was made.

The Appellate decision focused on the third element which is the hostility to the true owner. The notice to the other party may be either actual or constructive. Constructive notice clearly did not meet the standards to a co-owner. Apparently the appellate decision relied upon the statement *we know what you have done* as constituting actual notice. Page 7 of the appellate decision the appellate court states: ""We know what you have done" and asserted her right to the whole property on account of his misdeeds."

There are two problems with this. First of all, the only thing Chastain actually testified to that she stated was "we know what you have done". Nowhere in the transcript material was there any claim made by Chastain that she unequivocally told Robinson, directly or indirectly, that she was asserting her right to the whole property on

account of his misdeeds. As noted by the appellate decision itself at page 6 of the appellate decision the occupying tenant must impart notice to the tenant out of possession of an open, notorious and unequivocal nature. The statement that *we know what you have done* is not open, notorious and unequivocal which is the standard that must be applied in a co-tenancy situation. Even assuming that a reasonable person would have understood Chastain's statement under the circumstances in which it was made as constituting a claim to the property this objective understanding of the non-occupying co-tenant is not the standard to be applied. The legal requirement is that the notice must be open, notorious and unequivocal. Once again, this is an issue which appellant should be entitled to comment on because it is a new matter, to wit, whether or not the focus is on the objective acts undertaken by the claiming party of the subjective understanding of the existing party to an adverse possession claim.

The appellate decision did not base any decision on the color of title theory instead, bit chose to sustain the lower courts decision based solely on the claim of right theory. The appellate decision acknowledged that where there are co-tenants there must be something more than simple possession of the premises. It may be clear that Chastain wanted the property, but, nothing she did put Robinson on notice that she was in fact claiming the property was hers. The appellate decision made fundamental error in assuming that all that was required under a color of claim theory was that the property was improved not that the

party adversely possessing the property was the one making the improvements to trigger the running of the five year statute.

CCP §325 reads in relevant part as follows:

> "...a person claiming title, not found in the public written instrument... is deemed to have possessed an occupied in the following cases only; first - where it has been protected by substantial enclosure; second- where it has been usually cultivated or improved."

To make any sense at all, the statute must be read that a person who is asserting a claim of right must have during the period of claimed possession done something to improve the property not merely taken possession of the property which was already improved and maintaining it unchanged. The case law is clearly in support of this principal: claim of right is created only when the land has been protected by a substantial enclosure or the land has been usually cultivated or improved, See Thompson vs. Dypvik (1985) 174 CA 3d 329, 339; Track Development Services, Inc. vs. Kempmore 199 CA 3d 1374, 1386; land usually cultivated or improved may occur when something has been done to the land. In Rideout vs. Covillud (1919) 39 CA 417, 419 the Court held that the lots at issue usually cultivated and improved on the grounds that: (1) the lots originally constituted a slough; (2) the lots were already filled with sand up to the street; (3) one of the lots was used as a dump; (4) the grates to the lots were filled with sand, brought up to grade and converted in the sump or cesspool into individual lots. Another court in Devi vs. Dowing

264 CA 2d 278, 282 found that a sign posted on the property does not constitute an improvement upon the property sufficient to satisfy the element of usually cultivated and improved.

In Dimmick vs. Dimmick (1962) 58 C 2d 417 a case relied upon by the appellate decision, the claimant paid off the encumbrance, financed the annual growing of crops, improved the land by fencing it, painting the house and adding a room, cupboards and other fixtures. He drilled three irrigation wells besides domestic wells, installed two electric motors, a turbine pump, a centrifugal pump and pipelines, a tank tower, a 2500 gallon tank, a pressure system and a new electric hot water tank. He also build a 24x48 foot shop and garage, scrapped the land and put in cement headgates. See 58 C 2d 420. Because the plaintiffs and defendants were co-tenants these actions were found to be insufficient to establish adverse possession as against his co-tenant because:

> "It is a fundamental rule that each tenant in common have a right to occupy the whole of the property. The possession of one is deemed the possession of all; each may assume that another in exclusive possession is possessing for all and not adversely to the other; consequently one tenant in common does not merely by exclusive possession, gain title by adverse possession against the others. Such possession will be presumed to be by permission and rightful, unless notices brought home to the other that it has become hostile". See 58 C 2d 422.

Since, the trial court never made a finding that the original deed which Robinson acquired title was fraudulent and therefore could be set aside, as a matter of law Chastain and Robinson were co-tenants. The permission to occupy the premises therefore is presumed. At its strongest, the statement *we know what you have done* permits an inference to be drawn that Chastain was hostile to Robinson personally and wanted the property. As a matter of law it simply does not meet the unequivocal nature of notice that must be given by one co-tenant to another. Because of the fundamental misapprehension that Robinson had acquired his deed by fraud the Court simply ignored this well established doctrine.

The only finding in the statement of decision by the trial court arguably implies that the finding number 5 were it simply states that Chastain's possession of the property was land that was usually improved and was used for the ordinary use of the occupant. The trial court did not identify anything whatsoever that Chastain did to improve the property during the period of her "possession". Attorney Lewin, argued on behalf of Chastain but did not identify anything that Chastain did to improve the property. All that Chastain did was live in the property. As the appellate decision itself acknowledges when co-tenants are involved possession is simply not sufficient.

V. CONCLUSION

In this matter a rehearing should be granted because the clear and convincing evidence standard should have been utilized by the trial court instead

of the preponderance of the evidence standard and since the issue was not contested by the respondent the appellant should be given an opportunity to brief the position of the appellate decision which was new matter; acceptance by the appellate court of fraud was also new matter because it was not asserted by the respondent's brief and has enormous implications for the standards that would have to be imparted upon a cotenant; the appellate court misapprehended the record when it indicated that Chastain had asserted her right to all of the property when no such verbal standard was made and unequivocal notice must be given to a co-tenant.

DATED: October 9, 2008 Respectfully submitted,

Michael F. Babitzke
Attorney for Appellant,
Kirk Robinson

IN THE
SUPREME COURT OF CALIFORNIA

Kirk D. Robinson
Appellant,

v.

Shann Elyse Chastain
Respondent.

Case No. S168010

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Fourth Appellate District
Division Three
Case No. G038954

On Appeal from the Superior Court of California
Orange County
The Honorable David A. Thompson, Judge
Case No. 05CC12936

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I. INTRODUCTION

Petitioner Kirk Robinson (Robinson) owned real property in the City of Orange in joint tenancy with his grandmother Lorraine Chastain. (RT 78, L16 to RT 84, L14). Respondent Shann Chastain acquired a general power of attorney from Lorraine who was her mother. (AA 404) Respondent utilized this general power of attorney to deed to herself the real property which her mother Lorraine previously held in joint tenancy with petitioner. (AA 414) Lorraine Chastain died in 2000. Respondent moved into the real property, paid taxes and made the modest mortgage payment. Petitioner brought an action to quiet title against respondent. Respondent cross complained asserting adverse possession. (AA 45) The trial court found in favor of respondent on the question of adverse possession utilizing a more likely than not true standard and ignoring the clear violation of Probate Code §4264, which prohibits a fiduciary from conveying property to him/herself without express written authority from the principal. (AA 380-381).

The petitioner appealed. The Fourth District affirmed arguing that the clear and convincing evidence standard was limited to situations where legal title is undisputed and the controversy surrounds only the beneficial title. (See Opinion, Pg 5) This statement of law is inconsistent with virtually every other decision discussing the standard of proof required for an adverse possession or prescriptive easement claim.

The Court of Appeals also trivialized the violation of fiduciary duties by respondent and

asserted it did not matter if she was committing fraud because the absence of valid title would simply convert her case to a claim of right. (See Opinion, Pg 9).

Review of this case should be granted because there is a compelling need to know with clarity and certainty the burden of proof required on adverse possession claim and what restrictions are created when a party enters possession and claims ownership based on a breach of fiduciary duty.

II. THE SUPREME COURT SHOULD HEAR THIS DECISION BECAUSE THE COURT OF APPEAL DECISION RESULTS IN CONFLICTING RULES OF LAW IN AN IMPORTANT AREA OF THE LAW

Adverse possession and prescriptive easements are matters that need clear and unequivocal rules. The need for clearness and predictability transcends other areas of the law because so many tax assessors, banks, lenders, title companies, and homeowners must deal on a daily basis with situations involving competing claims to title and ownership which if not readily resolved can lead to a litany of problems including questions of ownership, boundary disputes and inevitable lawsuits.

The Fourth Appellate District, in its decision in this case, has created an ambiguity concerning two important principals of law which are in conflict with other principals which had been previously articulated by other circuits and cases and the ambiguity erodes the predicted value of this area of the law.

The first such area involves the burden of proof and the second area involves the implications of violations of Probate Code §4264.

III. THE PROPER STANDARD FOR A CLAIMANT ATTEMPTING TO ESTABLISH ADVERSE POSSESSION IS CLEAR AND CONVINCING EVIDENCE

The trial court used in making it's decision the more likely than not standard of evidence. (AA 380, L7). This issue was raised in appellants opening brief. (See AOB 14). The appellate decision stated that the clear and convincing evidence standard only applied where valid legal title was undisputed and the controversy surrounded only the beneficial title. (See Appellate Decision Pg 5). The Court of Appeal's decision, however, conflicts with virtually every decision discussing the standard of proof in an adverse possession or prescriptive easement case dating back to the early 1900's. See Spottswood vs. Spottswood (1907) 4 CA 711 stating: "such elements must be shown by clear and positive proof". At 4 CA 714; Landany vs. S.M. Day (1968) 264 CA 2d 278 "the burden is on the claimant to prove every essential element by clear and satisfactory evidence". See 264 CA 2d 281; Applegate vs. Ota 146 CA 3d 702, 708 finding that a prescriptive easement must be based upon clear and convincing evidence; Brewer vs. Murphy (2008) 161 CA 4th 928 findings must be based on "clear and convincing evidence". See 161 CA 4th 938.

Whether an adverse possession claim must be established by clear and convincing evidence or merely by a preponderance of the evidence is

obviously of great importance particularly because in adverse possession cases result from activities and/or inactivities that take place over a period of years, the lawsuits themselves may typically take an additional period of time, and given the passage of such periods of time the memories of witnesses, the location of documents, changing circumstances create inherently fact driven situations which often are decided on the basis of what standard of proof is to be utilized. The Fourth District's pronouncement conflicts with cases cited above and numerous other cases and in fact lowers the standard necessary to establish an adverse claim. The lowering of the standard potentially opens a floodgate and other litigants may feel comfortable bringing an action to establish adverse possession under the lower standard, as contrasted to historical practices of discouraging claimants from bringing an adverse possession action because of the need to meet higher standard of clear and convincing evidence. The net effect will be to create more instability in land title and boundaries at a time in history when more certainty not less certainty is clearly desirable from the social policy perspective.

It does not matter that the Fourth District's decision was not published because with the advent of access to the internet the distinction between the published and unpublished decision is eroded. While, to be sure, an unpublished decision cannot be cited as established law, it certainly can be relied upon by attorneys advising clients, title companies issuing title policies, and bankers making loans. Taken together, the social and legal significance of the decision has far reaching

implications with respect to California land owners and such a significant departure from existing law should be reserved for the Supreme Court.

IV. THE SUPREME COURT SHOULD REVIEW THE TREATMENT BY THE FOURTH DISTRICT OF PROBATE CODE §4264

In this matter, the genesis of the respondents claim was the recordation of a deed which she was able to record only because she had the power of attorney of the deceased grandmother of petitioner. (AA 404, 413-414). Probate Code §4264 prohibits a holder of a general power of attorney from making or revoking a gift of the principals property in trust or otherwise or creating or changing a survivorship interest in the principals property or in property in which the principal may have an interest.

It was undisputed that in fact respondent made a quit claim deed to respondent based upon the respondent holding a general power of attorney of the grandmother of petitioner. (AA 414-416).

In short, the respondent did precisely what Probate Code §4264 prohibits; making a gift to yourself of property owned by the principal.

Prior to this decision, the cases that have discussed the implications of a violation of §4264 have been consistent in holding such attempts would be void as a matter of law. See Estate of Huston (1997) 51 CA 4th 1721, Schubert vs. Reynolds (2002) 95 CA 4th 100; Shields vs. Shields (1962) 200 CA 2d 99.

The Fourth District decision trivializes breach of fiduciary duty by arguing that even if the deed

itself was void the respondent was making a claim of right and there was sufficient evidence to support such a claim. The problem here, however, is that the law relied upon by the Fourth District relates to when a claimant is mistaken about the legal sufficiency of his claim of title that can be considered a claim of right have involved situations where the issue of fiduciary duty has not been involved.

The appellate court relied on cases holding that possession under a void deed may be viewed under color of right cases. See Johns vs. Scobie (1939) 12 C 2d 618, 624. However, there has not been a California case expanding this doctrine to a person who has obtained the deed by directly violating a fiduciary duty. To do so, would improperly award wrongful behavior.

Accordingly, the doctrine permitting a mistaken claim under color of title to be considered a claim of right has been around for awhile heretofore it has never been expanded to include a claim based upon a breach of fiduciary duty. This is a case of first impression and if the rule is to be expanded it is of sufficient importance that it should be expanded by the Supreme Court. The reason for this is that there are many people who have general powers of attorneys recorded in California. If it becomes an accepted part of the real estate culture to permit individuals with general powers of attorney to be able to begin the commencement of an adverse possession claim by violating their fiduciary duty and then having a safe harbor for such violation the potential for chaos is totally unacceptable. The point is the difference between a mistaken belief as

to title and title asserted by virtue of a breach of fiduciary duty is a difference in kind and not merely a difference in degree. It is respectfully submitted that it is a sufficient change in California law with sufficiently adverse circumstances that review by this Court is warranted.

V. CONCLUSION

In this matter, a total injustice has occurred with respect to petitioner. The personal injustice to petitioner Kirk Robinson however, is not the point. The point is that there is now a decision on the books which has lowered the standard of the burden of proof for adverse possession claim and expanded potential claimants to include those persons who claim only arises as a direct result of a breach of fiduciary duty. These two principals inter-relate with each other to a sufficient degree to constitute a frightening erosion of the stability of title to real property in California and clearly create a conflict with decisions made by other Courts. Under these circumstances, it is appropriate and proper and indeed compelled that this Court accept this petition for review.

DATED: November 3, 2008 Respectfully submitted,

Michael F. Babitzke
Attorney for Petitioner/Appellant

Kirk Robinson

Recorded in the County of Orange, California
Gary L. Granville, Clerk / Recorder
(Bar Code Omitted) 3:37pm 05/20/98

STATUTORY SHORT FORM POWER OF ATTORNEY (California Probate Code Sections 4400, et seq.)

WARNING: UNLESS YOU LIMIT THE POWER IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO ACT FOR YOU IN ANY WAY YOU COULD ACT FOR YOUR-SELF. FOR EXAMPLE, YOUR AGENT CAN:

BUY, SELL AND MANAGE REAL AND PERSONAL PROPERTY FOR YOU. THIS MEANS THAT YOUR AGENT CAN SELL YOUR HOME, YOUR SECURITIES AND YOUR OTHER PROPERTY.

DEPOSIT AND WITHDRAW MONEY FROM YOUR CHECKING AND SAVINGS ACCOUNTS.

BORROW MONEY USING YOUR PROPERTY AS SECURITY FOR THE LOAN.

PUT THINGS IN AND TAKE THINGS OUT OF YOUR SAFETY DEPOSIT BOX.

OPERATE YOUR BUSINESS FOR YOU.

PREPARE AND FILE TAX RETURNS FOR YOU AND ACT FOR YOU IN TAX MATTERS.

ESTABLISH TRUSTS FOR YOU AND TAKE OTHER ACTIONS FOR YOU IN CONNECTION WITH PROBATE AND ESTATE PLANNING MATTERS.

PROVIDE FOR THE SUPPORT AND WELFARE OF YOUR SPOUSE, CHILDREN AND DEPENDENTS.

CONTINUE PAYMENTS TO THE CHURCH AND OTHER ORGANIZATIONS OF WHICH YOU ARE A MEMBER AND MAKE GIFTS TO YOUR SPOUSE, DESCENDANTS AND CHARITIES.

THIS DOCUMENT DOES NOT AUTHORIZE YOUR AGENT TO MAKE MEDICAL AND OTHER HEALTH CARE DECISI0NS FOR YOU. YOU CAN DESIGNATE AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU ONLY BY A SEPARATE DOCUMENT.

IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN SECTIONS 2460 TO 2473, INCLUSIVE, OF THE CALIFORNIA CIVIL CODE.

THE POWERS GRANTED BY THIS DOCUMENT WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT. THESE POWERS WILL CONTINUE TO EXIST NOTWITHSTANDING YOUR SUBSEQUENT DISABILITY OR INCAPACITY UNLESS YOU INDICATE OTHERWISE IN THIS DOCUMENT.

YOU CAN ELIMINATE POWERS OF YOUR AGENT BY CROSSING OUT ANY ONE OR MORE OF THE POWERS LISTED IN PARAGRAPH 3 OF THIS FORM. YOU CAN

WRITE OTHER LIMITATIONS JI.ND SPECIAL· PROVISIONS IN PARAGRAPH 4 OF THIS FORM. HOWEVER, IF YOU DO NOT WANT TO GRANT YOUR AGENT THE POWER TO ACT FOR YOU IN ANY WAY YOU COULD ACT FOR YOURSELF, IT MAY CONSULT WITH A LAWYER INSTEAD OF BE IN YOUR USING THIS BEST INTEREST FORM.

THIS DOCUMENT MUST BE SIGNED BY TWO WITNESSES AND BE NOTARIZED TO BE VALID

YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS POWER OF ATTORNEY.

YOU ARE NOT REQUIRED TO USE THIS FORM; YOU MAY USE A DIFFERENT POWER OF ATTORNEY IF THAT IS DESIRED BY THE PARTIES CONCERNED.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

1. DESIGNATION OF AGENT. I, ELIZABETH LORRAINE CHASTAIN, also known as LORRAINE CHASTAIN, residing at 274 North Magnolia Street, Orange, California 92866, do hereby appoint SHANN ELYSE CHASTAIN, whose permanent home address is 274 North Magnolia Street, Orange, California 92866, as my Attorney-in-Fact (Agent) to act for me and in my name as authorized in this document.

2. DESIGNATION OF ALTERNATE AGENT. In the event that SHANN ELYSE CHASTAIN is not

available or willing or becomes ineligible to act as my Attorney-in-Fact or loses the mental capacity to decisions for me, or if I revoke her appointment or authority to act as my Attorney-in-Fact, then I, ELIZABETH LORRAINE CHASTAIN, also known as LORRAINE CHASTAIN, hereby appoint N/A, whose home address is, as my Attorney-in-Fact (Agent) to act for me and in my name as authorized in this document.

3. CREATION OF DURABLE POWER OF ATTORNEY. By this document I intend to create a general power of attorney under sections 4400, et seq. of the California Probate Code or any appropriate succeeding prov1s10ns. Subject to any limitations in this document, this power of attorney is a durable power of attorney and shall not be affected by my subsequent incapacity.

(If you want this power of attorney to terminate automatically when you lack capacity, you must so state in paragraph 4 ("Special Provisions and Limitations") below.)

4. STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent(s) full power and authority to act for me and in my name;. in any way which I myself could act, if I were personally present and able to act, with respect to the following matters as each of them is defined in the pertinent sections of the California Probate Code or other pertinent succeeding provisions to the extent that I am permitted by law to act through an agent:

a. Real estate transactions;
b. Tangible personal property transactions;

c. Bond, share and commodity transactions;
d. Financial institution transactions;
e. Business operating transactions;
f. Insurance transactions;
g. Retirement plan transactions;
h. Estate transactions; Claims and litigation;
i. Tax matters;
j. Personal relationships and affairs;
k. Benefits from military service;
l. Records, reports and statements;
m. Full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) shall select; and,
n. All other matters

(strike out anyone or more of the items above to which you do NOT desire to give your agent authority. Such elimination of any one or more items a to n, inclusive, automatically constitutes an elimination of item o. TO STRIKE OUT AN ITEM, YOU MUST DRAW A LINE THROUGH THE TEXT OF THAT ITEM.)

5. SPECIAL PROVISIONS AND LIMITATIONS. In exercising the authority under this power of attorney, my agent(s) is subject to the following special provisions and limitations:

My Attorney-in-Fact shall act without limitation.

(Special provisions and limitations may be included in the Statutory Short Form Power of Attorney only if they conform to the requirements of section 2455 of the California civil Code.)

6. EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED. If I have designated more than one agent, the agents are to act N/A

(If you designate more than one agent and wish each agent alone to be able to exercise this power, insert in this blank the word "severally". Failure to make an insertion or the insertion of the word "jointly" will require that the agents act jointly.)

7. DURATION. (The powers granted by this document will exist for an indefinite period of time unless you limit their duration below.)

This power of attorney shall not expire during my lifetime.

(Fill in this space ONLY if you want the authority of your agent to terminate before your death.)

8. NOMINATION OF CONSERVATOR OF ESTATE. (A conservator of the estate may be appointed for you if a court decides that one should be appointed. The conservator is responsible for the management of your financial affairs and your property. You are not required to nominate a conservator but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests. You may, but are not required to, nominate as your conservator the same person you named in paragraph 1 as your agent. You may nominate a person as your conservator by completing the space below.)

If a conservator of the estate is to be appointed for me, I nominate the following person to serve as Conservator of the estate: SHANN ELYSE

CHASTAIN, whose permanent home address is 274 North Magnolia Street, Orange, California 92866.

9. DESIGNATION OF ALTERNATE CONSERVATOR. In the event that SHANN ELYSE CHASTAIN is not available or willing or becomes incligible to act or loses the mental capacity to act as Conservator of my estate, or if I revoke her appointment or authority to act as my Conservator, then I nominate N/A whose home address is ___ to serve as Conservator of my estate.

DATE AND SIGNATURE OF PRINCIPAL

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)

I, ELIZABETH LORRAINE CHASTAIN, sign my name to this Statutory Short Form Durable Power. of Attorney on Dec. 28 , 1997, at Orange, California.

Elizabeth Lorraine Chastain
Elizabeth Lorraine Chastain

(THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS BOTH (1) SIGNED BY-TWO ADULT WITNESSES WHO ARE PRESENT WHEN YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE AND (2) ACKNOWLEDGED BEFORE A NOTARY PUBLIC IN CALIFORNIA.)

STATEMENT OF WITNESSES

(READ CAREFULLY BEFORE SIGNING. You can sign as a witness only if you personally know the principal or the identity of the principal is proved to you by convincing evidence.)

(To have convincing evidence of the identity of the principal, you must be presented with and reasonably rely on anyone or more of the following:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles that is current or has been issued within five years;

(2) A passport issued by the Department of State of the United States that is current or has been issued within five years; or,

(3) Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person and bears a serial or other identifying number:

(a) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service;

(b) A driver' s license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses;

(c) An identification card issued by a state other than California; or,

(d) An identification card issued by any branch of the armed forces of the United States.)

(other kinds of proof of identity are not allowed.)

I declare under penalty of perjury under the laws of California that the person who signed or acknowledged the document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal

signed or acknowledged this power of attorney in my presence, and that the principal appears to be of sound mind and under no duress, fraud or undue influence.

Lennard Feddersen Signature	266 Pineview Address
Lennard Feddersen Print Name	Irvine, CA 92620
12-28-97 Date	714-669-4518 Telephone
Jack Flanagan Signature	539C Kiolu Dr. Address
Jack Flanagan Print Name	Kakua, HI 96734
12-28-97 Date	(808) 261-7950 Telephone

CERTIFICATE OF ACKONWLEEDGEMENT OF NOTARY PUBLIC

STATE OF CALIFORNIA

COUNTY OF ORANGE

On April 17, 1998 I 1998, before me, Mildred N. Cork, the undersigned, personally appeared ELIZABETH LORRAINE CHASTAIN I personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity and that by her signature

on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Mildred N. Cork
Notary Public

Mildred N. Cork
Commission # 1082014
Notary Public – California
Orange County
My Commission Expires Jan 1, 2000